In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-873

MARK AVRECH, PETITIONER

v.

SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.) is reported at 520 F.2d 100. Neither the written nor the oral opinion of the district court is reported; they are reproduced as Appendices B and C to the jurisdictional statement in the prior appeal in this case, *Secretary of the Navy* v. *Avrech,* No. 72-1713, O.T. 1972, pp. 27-34.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1975. The petition for a writ of certiorari was filed on December 22, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's court-martial conviction for attempting to publish in a combat zone a written state-

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ment designed to promote disloyalty and disaffection among the troops violated his First Amendment right of free speech.

STATEMENT

While a United States Marine serving on active duty in the Republic of Vietnam, petitioner was tried by a special court-martial on charges of having violated Articles 80 and 134 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. 880, 934 (J.S. App. A, pp. 14-15).[1] Article 134, known as the General Article, proscribes, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces." Article 80 provides for punishment of attempts to commit offenses otherwise punishable under the UCMJ.

Petitioner was charged under Article 134 with publishing a written statement disloyal to the United States to members of the armed forces "with design to promote disloyalty and disaffection among the troops," and under Article 80 with attempting to publish that statement (J.S. App. A, p. 14).

While on night duty with the group supply offices of his unit in the combat zone at Marble Mountain Air Facility, Danang, Vietnam, petitioner prepared a stencil criticizing American involvement in Vietnam. It stated (J.S. App. A, pp. 15-16):

> I've been in this country now for 40 days and I still don't know why I'm here. I've heard all the arguments about communist aggression and helping the

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[1]Citations to the record, as summarized by the court of appeals, refer to the jurisdictional statement in the prior appeal in *Secretary of the Navy* v. *Avrech*, No. 72-1713, O.T. 1972.

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poor defenseless people. I've also heard this three years ago. The entire Vietnamese Army will switch to a pacification role in 1967 and leave major fighting to the American troops. (Statement of South Vietnamese Foreign Minister, L.A. Times, Nov. 18, 1966). It seems to me that the South Vietnam people could do a little for the defense of their country. Why should we go out and fight their battles while they sit home and complain about communist aggression. What are we cannon fodder or human beings? If South Vietnam was willing to go it on their own back in 1964 what the hell is the matter with them now? The United States has no business over here. This is a conflict between two different politically minded groups. Not a direct attack on the United States. It's not worth killing American boys to have Vietnam have free elections. (Former Vice President Richard M. Nixon, L.A. Times, December 31, 1967.) That was our present leader of this country and now he has the chance to do something about the situation and what happens. We have peace talks with North Vietnam and the V.C. That's just fine and dandy except how many men died in Vietnam the week they argued over the shape of the table? Why does this country think that it can play games with peoples lives and use them to fight their foolish wars, I say foolish because how can you possibly win anything like a war by destroying human lives. Human lives that have no relation at all to the cause of the conflict. Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace then a complete U.S. withdrawal. We've been sitting ducks for too long. * * *

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On April 15, 1969, petitioner asked another marine, who was operating the mimeograph machine in their office, to duplicate the statement or permit him to do so. When that marine inquired about the contents of the stencil, petitioner allowed him to read it (J.S. App. A, p. 16). Petitioner testified that he had prepared the stencil to record his thoughts and circulate a written statement "for discussion" (Brief for the Appellant, No. 72-1713, pp. 5-6). The marine turned the stencil over to a superior officer, and this prosecution ensued (*ibid*).

Petitioner was convicted of the attempt to publish the statement but acquitted of the substantive charge. He was sentenced to reduction in rank to the lowest enlisted grade, forfeiture of three months' pay and confinement at hard labor for one month (*ibid.*). His commanding officer suspended the confinement, but the findings of the court-martial and the remainder of the sentence were sustained by the Staff Judge Advocate and the Judge Advocate General of the Navy (J.S. App. C, p. 30).[2]

Petitioner then sought collateral relief from his court-martial conviction in the United States District Court for the District of Columbia. Asserting jurisdiction under 5 U.S.C. 701-706, 28 U.S.C. 1331 and 1361, he alleged that the General Article was unconstitutionally overbroad and that his statement was protected by the First Amendment. He sought an order requiring the Secretary of the Navy to expunge any record of his conviction and to restore all pay and benefits lost because of his conviction.

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[2]Petitioner subsequently was given a bad conduct discharge from the Marine Corps after a second, unrelated court-martial conviction for theft of a camera from a Marine Corps Exchange, in violation of Article 121 of the UCMJ, 10 U.S.C. 921 (J.S. App. A, p. 17).

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The district court held that petitioner's statement was not protected by the First Amendment and that the General Article was not unconstitutionally vague (J.S. App. B, pp. 27-28; App. C, pp. 29-34). The court of appeals reversed on the ground that Article 134 was unconstitutional, and thus did not decide petitioner's First Amendment claim. On the authority of *Parker* v. *Levy*, 417 U.S. 733, this Court reversed, holding that Article 134 is not unconstitutionally vague. *Secretary of the Navy* v. *Avrech*, 418 U.S. 676.

On remand, the court of appeals (one judge dissenting) rejected petitioner's First Amendment claim. The court noted that because petitioner "on appeal during the entire military review process" had not challenged the instructions given to the court-martial on his First Amendment claim (Pet. App. 6a), no transcript of the instructions had been prepared. The court concluded, however, that although it could not determine the precise instructions given, " 'the issue of First Amendment protection' was put to the special court-martial" (Pet. App. 5a; footnote omitted). It ruled that petitioner's failure to raise the issue during his military appeals, with the consequence that the record does not show the actual instructions given, "operated to prejudice the Government's ability to defend" and it "conclude[d] that the First Amendment claim of [petitioner], which at base revolves solely around the propriety of the instructions given by the court-martial president on that defense, was in effect waived by the failure of [petitioner] to raise it at any time in the military appeals process" (Pet. App. 6a; footnote omitted).

ARGUMENT

Petitioner was convicted of attempting to publish in a combat zone a statement "with design to promote disloyalty and disaffection among the troops." The statement (pp. 2-3, *supra*) was sharply critical of the American

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war effort in Vietnam. It asked "[w]hy should we go out and fight their battles while they sit home and complain about communist aggression. What are we cannon fodder or human beings?"; and stated that "[t]he United States has no business over here. * * * We've been sitting ducks for too long."

In the tense and sensitive situation then existing in Vietnam, the statement could fairly be, and was likely to be interpreted by the troops as an appeal not to participate in further military activities. At the very least, the military authorities were justified in viewing the statement as designed to promote, and as posing a clear threat of promotion of, "disloyalty and disaffection among the troops." Contrary to petitioner's contention, it was not merely a "mild statement of disagreement with governmental policy" (Pet. 6) or one merely "criticizing the contribution the South Vietnamese were making toward the war effort" (Pet. 2). To the contrary, as the district court correctly found—a finding that the court of appeals did not disturb—petitioner's attempt to publish this statement "to the members of a military unit which was at that time engaged in active military combat operations presented a distinct threat to the maintenance of military discipline and morale within the unit" (J.S. App. C, p. 33).

"While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it" (*Parker* v. *Levy*, 417 U.S. 733, 758). The court-martial conviction of petitioner for attempting to publish this statement to the troops in a combat zone did not violate his First Amendment right of free speech.

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"There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command" (*Greer* v. *Spock*, No. 74-848, decided March 24, 1976, slip op. p. 11). As the United States Court of Military Appeals has pointed out (*United States* v. *Priest*, 21 U.S.C.M.A. 564, 570, quoted with approval in *Parker* v. *Levy*, *supra*, 417 U.S. at 759), in words that are particularly apposite in the present case:

> The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.

In reviewing a court-martial conviction on collateral attack, the role of civilian courts is limited. Those courts must give significant weight to the expert judgment of the military tribunals with respect to the impact that particular activities are likely to have in the specialized military society, and particularly upon the conduct of military operations. Cf. *Schlesinger* v. *Councilman*, 420 U.S. 738, 753, 757-758, 760.

In the present case, the military appellate courts' rejection of petitioner's First Amendment claim necessarily reflected their judgment that the publication of petitioner's statement to the troops in a combat zone in Vietnam would pose a serious danger of creating disloyalty and disaffection among them that outweighed petitioner's First Amendment interest in attempting to publish it. Under the balancing test that this Court traditionally has applied in evaluating claims under the

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First Amendment, that conclusion was proper, and petitioner's conviction therefore did not violate that Amendment. Cf. *Barenblatt* v. *United States,* 360 U.S. 109; *Times Film Corp.* v. *Chicago,* 365 U.S. 43; *California Bankers Assn.* v. *Shultz,* 416 U.S. 21, 55-56.

Petitioner argues (Pet. 5) that the court of appeals applied the wrong standard when it stated (Pet. App. 3a) that "we will not overturn a conviction unless it is clearly apparent that, in the face of a First Amendment claim, the military lacks a legitimate interest in proscribing the defendant's conduct." That statement, however, was made with respect to the duty of courts-martial, in performing their balancing function in evaluating First Amendment claims, to weigh " 'legitimate military needs and individual liberties' " (*ibid.*). The court was not suggesting, as petitioner apparently contends (Pet. 5), that the sole inquiry in evaluating such First Amendment claims is "whether * * * 'the military lacks a legitimate interest in proscribing the defendant's conduct.' "[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[3]To the extent that petitioner's challenge to his conviction rests upon the alleged failure of the military judge to give the court-martial the proper instruction on the First Amendment issue, the court of appeals correctly ruled that the failure of the military to transcribe the instructions, because of petitioner's failure to raise the instruction issue within the military appellate system, made it impossible for the civilian courts to ascertain precisely what the instructions were and therefore to evaluate them. In these circumstances, it should be presumed "that the military court * * *responsibly * * *perform[ed] its assigned task." *Schlesinger* v. *Councilman, supra,* 420 U.S. at 758.